313 U.S. 567

Office - Supreme Court, U.S.
FILED
MAR 14 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 848

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

GILLER CONCRETE COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. J. Blackwell,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for the allowance of the writ	6
Prayer for writ	7
Brief in support of petition for writ of certiorari	9
Opinion of court below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	11
Argument	11
Summary of argument	11
Point A. The failure of Giller Concrete Company, Inc., to give information concerning the effective date of the cancellation (and the reasons for such cancellation) of the prior policy, issued by petitioner, no inquiry being made, was not a fraud upon the substituted insurer, American Mutual Liability Insurance Company, and did not otherwise void its contract, the subject-matter not being marine insurance, and the marine insurance rule not being applicable	12
Point B. The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the weight of authority as to the foregoing point, and is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit	16
Point C. The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the weight of authority as to the foregoing point, and is in conflict with the decision of the Supreme Court of Florida	18

Page

Point D. A difference of opinion, where no duty to pay exists, calling for a declaration of rights, but affording no ground for coercive relief, is not wrongful conduct, affording a ground for the enforcement of a penalty, under the Florida statute providing that a reasonable sum may be allotted as compensation to beneficiary for attorney's fees for prosecuting an action on an insurance policy where recovery is had 19

Conclusion 26

TABLE OF CASES CITED.

Aetna Ins. Co. v. *United Fruit Co.*, 304 U. S. 430, 58 S. Ct. 817, 82 L. Ed. 787 10

Aetna Life Ins. Co. v. *Wharton*, 284 U. S. 621, 76 L. Ed. 529 16

American Ins. Co. of Newark, N. J. v. *Robinson*, 120 Fla. 674, 163 So. 17, 20 18

Baxter v. *Continental Casualty Co.*, 284 U. S. 548, 52 S. Ct. 2, 76 L. Ed. 502 10

Eurich v. *General Casualty & Surety Co.*, 152 Md. 209, 136 Atl. 546, 548 12

Federal Ins. Co. of Hartford, Conn. v. *Sydeman*, 82 N. H. 482, 496, 136 Atl. 136 12

Fidelity M. L. Ins. Co. v. *Miller*, 92 Fed. 63 16

Finley v. *Western Empire Ins. Co., of Washington*, 69 Wash. 673, 125 Pac. 1012 12

Gillette v. *Utica Fire Ins. Co.*, 282 N. Y. S. 706 12

Globe Indemnity Co. v. *Daviess*, 243 Ky. 356, 47 S. W. (2d) 990, 995 ..... 14, 15

Great American Ins. Co. v. *Clayton*, 247 Ky. 612, 57 S. W. (2d) 467, 469 14

Hadley v. *Providence S. L. Assur. Soc.*, 90 Fed. 390, affirmed 102 Fed. 856, certiorari denied 179 U. S. 686, 21 S. Ct. 919, 45 L. Ed. 386 16

Hanover Fire Ins. Co. v. *Ray* (Tex. Civ. App.), 26 S. W. (2d) 295 12

Page

Hanover Fire Ins. Co. v. *Merchant's Transportation* Co., 15 F. (2d) 946, certiorari denied 273 U. S. 764, 47 S. Ct. 472, 71 L. Ed. 877 ..... 6, 16
Home Ins. Co. v. *Campbell Mfg. Co.*, 79 F. (2d) 588 .. 12
Jenkins v. *Price* (1907), 2 Ch. 229, 235 (English Case) 22
Kleiber Motor Truck Co. v. *International Ind. Co.*, 106 Cal. App. 709, 289 Pac. 865 13
Liverpool & London & Globe Ins. Co. v. *Payton*, 128 Ark. 528, 194 S. W. 503 14
May v. *Hartford Fire Ins. Co.*, 297 Fed. 997, 998 ... 12
Mears Min. Co. v. *Maryland Casualty Co.*, 152 Mo. App. 178, 144 S. W. 883 21
Muller v. *Globe & R. F. Ins. Co.*, 246 Fed. 759 16
National Union Indemnity Co. v. *Standard Accident Co.*, 179 Ark. 1097, 20 S. W. (2d) 125 12
New York Life Ins. Co. v. *Cumins*, 24 F. (2d) 1 ... 16
Ocean Accident & Guarantee Corp. v. *Northern Texas Traction Co.* (Tex. Civ. App.), 224 S. W. 212 21
Palm Beach Bank & Trust Co. v. *Lainhart*, 84 Fla. 662, 95 So. 122, 125 22
Pellaggi & Co. v. *Orient Ins. Co.*, 102 Vt. 384, 148 Atl. 869 12
Pendas v. *Equitable Life Assurance Society of the U. S.*, 129 Fla. 253, 176 So. 104 ..... 7, 21, 25
Public Service Commission v. *Batesville Tel. Co.*, 284 U. S. 6, 52 S. Ct. 1, 76 L. Ed. 135 10
Rose Inn Corp. v. *National Union Fire Ins. Co.*, 258 N. Y. 51, 179 N. E. 256, 83 A. L. R. 293 12
Rosenberg v. *Village of Whitefish Bay*, 199 Wis. 214, 225 N. W. 838 22
Schauer v. *Queen Ins. Co.*, 88 Wis. 561, 60 N. W. 994 12
Standard Ins. Co. v. *Philpot Constr. Co.*, 183 Ark. 694, 38 S. W. (2d) 26 21
Sterling Fire Ins. Co. v. *Comision Reguladora Del Mercado De Henequen*, 195 Ind. 29, 143 N. E. 2 ... 12
Stipcich v. *Metropolitan Life Ins. Co.*, 48 S. Ct. 512, 277 U. S. 311 15
Union Indemnity Co. v. *Vetter*, 40 F. (2d) 606, 608 .. 20
Union Terminal Co., et al., v. *Turner Constr. Co.*, 247 Fed. 727, 11 A. L. R. 880 22

Page

United States Fidelity & Guaranty Co. v. *Koch*, 102 F. (2d) 288 25
Warren v. *Franklin Ins. Co.*, 161 Iowa 440, 143 N. W. 554 12
West Haven Bank & Trust Co. v. *McCoy*, 117 Conn. 489, 169 Atl. 49 25
Wharton v. *Aetna Life Ins. Co.*, 48 F. (2d) 37 ..... 15, 16
Wharton v. *Aetna Life Ins. Co.*, 48 F. (2d) 37, certiorari denied 284 U. S. 621, 52 S. Ct. 9, 76 L. Ed. 529 ..... 15, 16

TABLE OF STATUTES CITED.

Compiled General Laws of Florida of 1927, Section 6220 (Sec. 4263 Revised General Statutes, Ch. 4173, Acts of 1893, as amended by Ch. 7295, Acts of Florida of 1917) 5, 19
Judicial Code, Section 240, as amended, 28 U. S. C. A. 347 10
Judicial Code, Section 274d, 28 U. S. C. A. 400 (Federal Declaratory Judgment Act) 5, 25

TEXT BOOKS.

American State Reports, Volume 59, page 647 (Freeman's Note) 18
Couch on Insurance, Volume 4, p. 2699, par. 829 16
Webster's International Dictionary 20

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 848

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

GILLER CONCRETE COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable Charles Evans Hughes, Chief Justice of The United States Supreme Court and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a declaratory judgment suit under the Federal Declaratory Judgment Act, brought in the District Court of the United States for the Southern District of Florida, by Giller Concrete Company, Inc., respondent, against Continental Casualty Company, petitioner herein.

It was contended that a policy of automobile liability insurance (R. 11) issued by petitioner to that respondent on the 6th day of December, 1938, was still in effect on the 3rd day of April, 1939, when Frederick S. Colburn and Myra Plumb Colburn were injured in a collision between one of the motor trucks described in said policy and a Buick automobile in which the Colburns were riding (R. 1, 10). A declaratory judgment to the effect that the petitioner was obligated to defend the Colburn claims was sought.

The Colburns had filed separate personal injury actions against Giller Concrete Company, Inc., (R. 41), claiming large damages, and it was asserted by the defendant in those actions, respondent here, that petitioner was obligated to assume the defense of those actions, on the respondent's behalf, and to pay any judgment that might be rendered therein within the limits of the policy.

Petitioner declined to assume the defense of the stated damage actions, taking the position that the automobile liability insurance policy above mentioned was cancelled by mutual consent of the parties thereto on the 29th day of March, 1939, at which time substitute liability insurance coverage on the motor vehicles of Giller Concrete Company, Inc., including the motor truck in question, was provided by American Mutual Liability Insurance Company, respondent.

At all times after the 6th day of December, 1938, Giller Concrete Company, Inc., had declined to pay unto the petitioner the premium on its policy of automobile liability insurance. Petitioner endeavored to collect the money so due it during the months of January, February and March, and did not immediately serve the customary five day notice to cancel the policy for such non-payment. Finally, being unwilling to further provide gratuitous insurance protection, it prepared to effect cancellation (R. 49, 50).

On the 23rd day of March, 1939, or thereabouts, Charles

Giller, as head of Giller Concrete Company, Inc., was interviewed by petitioner's agent, George O. Wright. Giller agreed to obtain substitute automobile liability insurance coverage for his said company, without formal notice of cancellation, upon the understanding that petitioner's policy would be allowed to continue in force for a short period, until substitute insurance could be arranged for (R. 50).

Charles Giller then notified his manager, Jack Bernard, to place the said automobile liability insurance with American Mutual Liability Insurance Company, respondent, and on the 28th day of March, 1939, Bernard wrote to the Jacksonville, Florida, office of the insurance company last named, ordering the insurance. On the following day that company placed the risk on binder, after its Jacksonville manager, one Hibler, had communicated with Bernard by long distance telephone, and was purported to have been told by Bernard that the prior policy had been cancelled (R. 51).

In connection with the foregoing, the record discloses (R. 51) that:

> "* * * it is undisputed that under date of March 28, 1938, Giller Concrete Company, Inc., through its duly authorized representative at Ft. Lauderdale, wrote a letter to American Mutual Liability Insurance Company, at Jacksonville, requesting that the latter company issue a policy in the name of Giller Concrete Company, Inc., on two International trucks, to cover public liability and property damage.
>
> "It is also undisputed that under date of March 29, 1939, American Mutual Liability Insurance Company, through its duly authorized representative, wrote a letter to Giller Concrete Co., Inc., in response to the latter's request for automobile insurance on its two International trucks, in which the following language was used:
>
> " 'Following receipt of completed and signed application at this office, policies will be promptly issued

> from our district office in Atlanta, Ga., and forwarded to you, *but pending receipt of same, you may accept this letter as full evidence of your insurance coverage with us.*' "

After the happening of the Colburn accident, on the 3rd day of April, 1939, American Mutual Liability Insurance Company, respondent, repudiated its binder agreement.

Giller Concrete Company, Inc., then called upon petitioner to defend the damage actions brought by Frederick S. Colburn and Myra Plumb Colburn. The petitioner declined to do so after learning of the binder agreement entered into on the 29th day of March, 1939, between Giller Concrete Company, Inc., and American Mutual Liability Insurance Company.

Thereupon, Giller Concrete Company, Inc., filed the declaratory judgment suit above referred to (R. 2) in the United States District Court for the Southern District of Florida, naming Continental Casualty Company as sole defendant. However, petitioner then filed a cross-complaint (R. 20) against American Mutual Liability Insurance Company, as third party defendant, relying upon the binder contract of insurance as having effected a termination of the policy issued on the 6th day of December, 1938.

The case was referred to a special master for findings of fact and conclusions of law. The master found (R. 53):

> "That at least ten days prior to April 3, 1939, it was mutually agreed that the automobile policy issued by Continental Casualty Company to Giller Concrete Co., Inc., would ipso facto become cancelled, and of no further force or effect, simultaneously with the procurement of other liability insurance coverage on the two motor trucks.
>
> * * * * * * *
>
> "That, in line with said agreement, such other liability insurance coverage was actually procured from

> American Mutual Liability Insurance Company under date of Mar. 29, 1939, at which time the Continental Casualty Company's policy was automatically cancelled and of no further force and effect."

The District Judge overruled the special master (R. 429), and held that the binder agreement did not become a valid contract of substituted insurance because the insured's agent informed the substitute insurer's manager that the original policy had been cancelled, but did not state further (no inquiry being made), that the cancellation would not be effective until substitute insurance was obtained.

The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (R. 467), and held that the binder agreement was voided by reason of the failure of the insured to supply, in a long distance telephone conversation, information that admittedly was not requested.

The Circuit Court of Appeals also held, on a cross-appeal taken by Giller Concrete Company, Inc., against Continental Casualty Company, that petitioner was liable (R. 466) for the said respondent's attorney's fees, incurred in prosecuting the said declaratory judgment suit, by virtue of a statute of the State of Florida, known as Section 6220, Compiled General Laws of 1927 (Section 4263, Revised General Statutes; Ch. 4173, Acts of 1893, as amended by Ch. 7295, Acts of Florida of 1917). This statute was enacted prior to the enactment of the Federal Declaratory Judgment Act of March 3, 1911 (28 U. S. C. A. 400), and prior to the passage of the Florida Declaratory Judgment Act of 1919 (Ch. 7857, Acts of Florida of 1919; Sec. 4953 *et seq.*, Compiled General Laws of Florida of 1927).

In so holding, the Circuit Court of Appeals reversed the ruling of the District Judge on the question as to attorney's fees, applying the attorney's fee statute to a situation not

contemplated by it, and penalizing the petitioner, not as an incident to a wrongful refusal to pay, and not as a corollary to coercive relief, so construing the said statute of the State of Florida in a manner conflicting with the construction thereof by the highest court of that State.

II.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Hanover Fire Insurance Co.* v. *Merchants' Transportation Co.*, 15 F. (2d) 946, Certiorari denied 273 U. S. 764, 47 S. Ct. 472, 71 L. Ed. 877, on a question of general importance, in holding that a contract of insurance did not result between Giller Concrete Company, Inc., and American Mutual Liability Insurance Company because the insured gave no information as to when the cancellation of the prior policy became effective and the reason for such cancellation, when no such information was sought by the insurer.

2. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision on an important question in the law of insurance contracts in a way probably in conflict with applicable local decisions, the insurance contract involved being a local contract entered into in the State of Florida. It is believed by petitioner that, under the law of Florida, the concealment that will void a contract of insurance is the intentional withholding of a material fact by the insured, and not the unintentional withholding of information not sought by the insurer.

3. The ruling of the Circuit Court of Appeals in this case, on the cross-appeal awarding attorney's fees to respondent,

Giller Concrete Company, Inc., for the prosecution of its suit for declaratory relief, is in conflict with the controlling decision of the Supreme Court of Florida in the case of *Pendas* v. *Equitable Life Assurance Society*, 129 Fla. 253, 176 So. 104, for that the highest court of the State of Florida has interpreted the Florida attorney's fee statute, here involved, as being applicable only in case of an insurer's wrongful refusal to pay, and not merely as an incident to the entry of judgment. A difference of opinion, where no duty to pay exists, calling for a declaration of rights, but affording no ground for coercive relief, is not wrongful conduct, within the Florida rule, which is here controlling, and affording a ground for the enforcement of a penalty.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9571, *Continental Casualty Company, Appellant,* v. *Giller Concrete Company, Inc., et al., Appellees,* to the end that the said cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this Court may seem proper.

Dated this 8th day of March, 1941.

T. J. BLACKWELL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 848

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

GILLER CONCRETE COMPANY, INC., AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion in the Circuit Court of Appeals (R. 462) is reported in 116 F. (2d) 431. A petition for rehearing (R. 468) was filed. It was denied (R. 473).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is December 30, 1940 (R. 467).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240, as amended, 28 U. S. C. A. 347.

3. There appear to exist conflicts between decisions of the Circuit Court of Appeals for the Fifth Circuit, in the case at bar, and decisions of the Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court of Florida, in regard to the concealment that will void a contract of insurance; the latter courts apparently holding that the intentional withholding of a material fact by the insured, and not the unintentional withholding of information sought by the insurer, constitutes such concealment, and the former apparently holding that a failure to supply information not sought by the insurer voids the contract. The conflict seems to impair uniformity of decision where uniformity is significant; conflicts which this Court's decision in the case at bar will remove. Reference is made to Section II of the preceding petition, entitled "Reasons Relied on for the Allowance of the Writ", which is hereby adopted and made a part of this brief.

4. The cases believed to sustain said jurisdiction are as follows: *Baxter* v. *Continental Casualty Co.*, 284 U. S. 548, 52 S. Ct. 2, 76 L. Ed. 502; *Public Service Commission* v. *Batesville Telephone Co.*, 284 U. S. 6, 52 S. Ct. 1, 76 L. Ed. 135; *Aetna Insurance Co.* v. *United Fruit Co.*, 304 U. S. 430, 58 S. Ct. 817, 82 L. Ed. 787.

III.

Statement of the Case.

This has already been stated in the preceding petition under Section I (pp. ——), which is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

1. The court erred in holding that a binder contract of insurance did not result between Giller Concrete Company, Inc., and American Mutual Liability Insurance Company, because the insured gave no information as to when the cancellation of the prior policy became effective, when no such information was sought by the insurer.

2. The court erred in holding petitioner liable for respondents' attorney's fees incurred in prosecuting a suit for a declaratory judgment, under the Federal Declaratory Judgment Act.

V.

ARGUMENT.

Summary of the Argument.

Point A. The failure of Giller Concrete Company, Inc., to give information concerning the effective date of the cancellation (and the reasons for such cancellation) of the prior policy, issued by petitioner, no inquiry being made, was not a fraud upon the substituted insurer, American Mutual Liability Insurance Company, and did not otherwise void its contract, the subject-matter not being marine insurance, and the marine insurance rule not being applicable.

Point B. The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the weight of authority as to the foregoing point, and is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit.

Point C. The decision of the Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the weight of

authority as to the foregoing point, and is in conflict with the decision of the Supreme Court of Florida.

Point D. A difference of opinion, where no duty to pay exists, calling for a declaration of rights, but affording no ground for coercive relief, is not wrongful conduct, affording a ground for the enforcement of a penalty, under the Florida statute providing that a reasonable sum may be allotted as compensation to beneficiary for attorney's fees for prosecuting an action on an insurance policy where recovery is had.

Point A.

Where a first policy of insurance is cancelled by the consent of both parties thereto, and a second insurance contract is substituted therefor, the substituted insurer, having no interest in the first contract, is not in position to question, or object to, the cancellation of the first policy. *Hanover Fire Ins. Co.* v. *Ray* (Tex. Civ. App.), 26 S. W. (2d) 295.

The requirement in a policy of insurance of five days' notice of cancellation, being for the benefit of the insured, is waived when, on notice of the insurer's desire to cancel, the insured contracts for other insurance to take the place of the first policy. *Finley* v. *Western Empire Ins. Co. of Washington*, 69 Wash. 673, 125 Pac. 1012; *Eurich* v. *General Casualty & Surety Co.*, 152 Md. 209, 136 Atl. 546, 548; *Rose Inn Corp.* v. *National Union Fire Ins. Co.*, 258 N. Y. 51, 179 N. E. 256, 83 A. L. R. 293; *May* v. *Hartford Fire Ins. Co.*, 297 Fed. 997, 998; *Sterling Fire Ins. Co.* v. *Comision Reguladora Del Mercado De Henequen*, 195 Ind. 29, 143 N. E. 2; *Federal Insurance Company of Hartford, Conn.*, v. *Sydeman*, 82 N. H. 482, 496, 136 Atl. 136; *Schauer* v. *Queen Ins. Co.*, 88 Wis. 561, 60 N. W. 994; *Pellaggi & Co.* v. *Orient Ins. Co.*, 102 Vt. 384, 148 Atl. 869; *Warren* v. *Franklin Ins. Co.*, 161 Iowa 440, 143 N. W. 554; *National Union Indemnity Co.* v. *Standard Accident Co.*, 179 Ark. 1097, 20 S. W. (2d) 125; *Gillette* v. *Utica Fire Ins. Co.*, 282 N. Y. S. 706; *Home Insurance Co.* v. *Campbell Mfg. Co.*, 79 F. (2d) 588.

Even where an insured or his authorized agent makes a misstatement, in applying for liability insurance, that no insurance has previously been cancelled on the motor vehicle specified, and the prior cancellation of such insurance is for a reason not affecting the risk, the mistake in that behalf is held not to be *material to the risk* in *Kleiber Motor Truck Co.* v. *International Ind. Co.*, 106 Cal. App. 709, 289 Pac. 865. It is there said:

> "The third misstatement was that no insurance had previously been canceled within three years. *The evidence shows that a previous policy had been canceled within four months for the non-payment of the premium.* In Victoria S. S. Co. *v.* Western Assurance Co., 167 Cal. 348, 139 P. 807, 811, the court says: '*Under these provisions, no right to avoid or rescind a subsisting policy occurs from the violation of any provision thereof, whether technically a warranty or not, unless such provision is material, except in cases where the policy itself declares that such breach shall avoid it.*'
>
> "The policy here in question particularly provides that the sort of misrepresentation which shall void it is a representation of a material fact and the plain meaning is that this shall be a material fact which affects the insurance applied for. The plaintiff Sumrall testified that, when he was notified that some preceding insurance had been canceled, he thought it meant the insurance had expired, and, having thought he had paid for a full year's insurance, he went to his vendor and asked for an explanation. The evidence further shows that this entire conversation took place in the presence of the defendant's agent, and anything material was thus known to the defendant when the policy was issued. It does not appear that Sumrall knew that the previous insurance had been canceled, as distinguished from an expiration, and the statement in the policy was not brought to the attention of either plaintiff, until after the fire. *The cancellation in question was not because of any defect in the truck or anything that affected its insurability,* and any delinquency in failure to meet the

> premiums was not that of the plaintiffs or either of them, but of someone else. *We cannot see how this could possibly have affected the desirability of this risk,* and, whether the misstatement in the policy was due to a mistake on the part of the agent or to misinformation given him by Haydis, it was not made by either of the plaintiffs, was entirely immaterial and any facts that were binding upon the plaintiffs were known to the agent of the defendant when the insurance was applied for. *Where the cancellation is for a reason not affecting the nature of the risk, it is not material.* Hawley *v.* Liverpool, London & Globe Insurance Co., 102 Cal. 651, 36 P. 926."

See, also, *Liverpool & London & Globe Ins. Co.* v. *Payton,* 128 Ark. 528, 194 S. W. 503, and *Globe Indemnity Co.* v. *Daviess,* 243 Ky. 356, 47 S. W. (2d) 990.

It is now universally recognized, we believe, that the concealment that will avoid a contract of insurance is the *intentional* withholding of a material fact by the insured. The concealment must also be fraudulent.

A recent case well illustrative of the foregoing is that of *Great American Insurance Co.* v. *Clayton,* 247 Ky. 612, 57 S. W. (2d) 467, 469. It is there said:

> "To avoid the policy the concealment must be of a matter *material to the risk,* and it must not only appear that the insured knew, or that the circumstances were such that an ordinarily prudent person would know, that the fact concealed was material to the risk, but also that it was intentionally and fraudulently concealed. Continental Insurance Company *v.* Ford, 140 Ky. 406, 131 S. W. 189. Fraudulent concealment exists where the insured has knowledge of a fact *material to the risk* which honesty and fair dealing require that he should communicate to the insurer but which he intentionally withholds, and this, although no inquiries were made. Queen Insurance Company *v.* Cummins, 206 Ky. 300, 267 S. W. 144."

The applicant's failure to disclose facts about which no questions are asked will not avoid a contract of insurance in the absence of fraud. *Wharton* v. *Aetna Life Insurance Company,* 48 F. (2d) 37, certiorari denied in *Aetna Life Insurance Company* v. *Wharton,* 284 U. S. 621, 76 L. Ed. 529. See also *Stipcich* v. *Metropolitan Life Insurance Co.,* 48 S. Ct. 512, 277 U. S. 311, 72 L. Ed. 895, reversing 8 F. (2d) 285.

In the case of *Globe Indemnity Co.* v. *Daviess,* 243 Ky. 356, 47 S. W. (2d) 990, 995, it was pointed out that *even when a false representation has been made, the question is not what the particular insurer would have done,* but whether, acting reasonably and according to the custom of companies writing similar insurance, it would have entered into the contract if the truth had been known. It was said:

> "The court sustained exceptions to those parts of the deposition of the superintendent of defendant's burglary department *in which he testified that, had his company been correctly informed as to the previous loss and collection of insurance of this character by the plaintiff and of the cancellation of the risk by another company,* his company would have made an investigation and would have been guided by the facts disclosed in the acceptance or rejection of the risk. *The action of the lower court was proper,* not only because he did not state what his company would have done under the particular facts which might have been disclosed by an investigation, *but also for the stronger reason that the question is not what the particular company alone would have done, but whether, acting reasonably in accordance with the usual custom, practice, or usage of insurance companies writing this kind of business, it would have issued the policy had the truth been disclosed by the applicant* and the facts had been revealed by a subsequent investigation. The facts are the important thing and not the practice of investigating. King *v.* Ohio Valley Fire & Marine Ins. Co., 212 Ky.

770, 280 S. W. 127; Hartford Fire Insurance Co. *v.* Golden, 188 Ky. 742, 224 S. W. 177."

The question as to whether a fact is actually material to the risk which the insurer is asked to assume is usually held to be one for the jury. *Hadley* v. *Providence S. L. Assur. Soc.*, 90 Fed. 390, affirmed, 102 Fed. 856, certiorari denied, 179 U. S. 686, 21 S. Ct. 919, 45 L. Ed. 386; *Fidelity M. L. Ins. Co.* v. *Miller*, 92 Fed. 63; *Muller* v. *Globe & R. F. Ins. Co.*, 246 Fed. 759; *New York Life Ins. Co.* v. *Cumins*, 24 F. (2d) 1; *Wharton* v. *Aetna Life Ins. Co.*, 48 F. (2d) 37, certiorari denied 284 U. S. 621, 52 S. Ct. 9, 76 L. Ed. 529. In the case at bar, the Special Master, as trier of the facts, found and held (R. 54) that no misrepresentation had been made. In this behalf he reported:

> "So conceding the truth of Mr. Hibler's uncorroborated testimony concerning every representation made by plaintiff's employee (Bernard), the fact remains that the latter actually made no misrepresentations of any single material fact."

The contract of insurance here involved was not one of maritime insurance. On the other hand, it related only to protection and indemnity incident to the operation of motor vehicles.

In such a case it is only where from the nature of the questions and answers in the application they are clearly material, and the answers are absolutely false, that the materiality is for the court as a law matter, and not for the trier of the facts, to determine. See Couch on Insurance, Vol. 4, page 2699, par. 829, and authorities there cited.

Point B.

In this connection, we respectfully refer the court to the case of *Hanover Fire Ins. Co.* v. *Merchant's Transportation Co.*, 15 F. (2d) 946, certiorari denied 273 U. S. 764, 47 S. Ct. 472, 71 L. Ed. 877.

There, a policy of liability insurance, issued to protect the operator of a vessel, was involved. It was held that the failure of the insured to give information concerning unseaworthiness of the vessel, no inquiry having been made, did not vitiate or impair the policy. Judge Rudkin, speaking for the Circuit Court of Appeals for the Ninth Circuit, said:

> "When the policy of insurance was applied for, *no information was given by the assured as to the then condition of the vessel, and no information was sought by the insurer.* Under such circumstances, if the case is controlled by the strict rule of maritime insurance, the failure of the assured to give information concerning the unseaworthy condition of the vessel would no doubt avoid the policy. *But as to other classes of insurance a more liberal rule obtains.*
>
> " 'According to the strict rule of maritime insurance, any omission to communicate a material fact which insured is under an obligation to disclose will vitiate the policy, although there may have been no intent to deceive and the omission may have been unintentional or with the belief that the fact is immaterial. The English and Canadian courts apparently have extended this doctrine generally to insurance upon risks of all natures, *but in the United States the trend of the later decisions as to other than marine risks, notably with reference to fire and life insurance, is to require that the nondisclosure of a fact which is not inquired about shall be fraudulent in order that it shall vitiate the policy,* and this rule has been applied, although the policy provides that it shall be void if insured has concealed any material fact or circumstance concerning the insurance or the subject thereof.' 32 *C. J.* 1271.
>
> *"Here no fraud was alleged or proved, aside from the mere failure of the assured to communicate facts concerning which no inquiry was made, and, if we are correct in our conclusion that this was not strictly a marine risk, such failure did not of itself constitute a defense."*

We beg to refer, also, to American State Reports, Volume 59, page 647, (Freeman's Note), as follows:

> "Concealment, according to the law of insurance, is a designed and intentional withholding of any fact material to the risk, which the assured ought, in honesty and good faith, to communicate; Clark *v.* Union Mut. Fire Ins. Co., 40 N. H. 333; 77 Am. Dec. 721. *But the insured is not expected to go into details about which the insurer manifests no interest and makes no inquiry:* Bebee *v.* Fire Ins. Co., 25 Conn. 51; 65 Am. Dec. 553, and note. See, also, Hall *v.* Niagara Fire Ins. Co., 93 Mich. 184; 32 Am. St. Rep. 497; note to Queen Ins. Co. *v.* Young, 11 Am. St. Rep. 58; Dooley *v.* Hanover Fire Ins. Co., 16 Wash. 155; 58 Am. St. Rep. 26."

In the absence of fraud, the failure of an insured to disclose a fact, or details pertaining to a fact, with reference to which no questions are asked, is not such a concealment as will avoid a policy of insurance.

Point C.

Under the Florida law, which is here controlling in view of the fact that the contract involved is a Florida contract (under the *Erie* case), a contract of insurance will not be forfeited for concealment, where the insurer makes no inquiry, unless the matter was fraudulently concealed. This is stated in the case of *American Insurance Co. of Newark, N. J.,* v. *Robinson,* 120 Fla. 674, 163 So. 17, 20, as follows:

> " * * * There was no allegation in the plea that insured had reason to believe that the existence of 'termites' or 'dry rot' in his dwelling was a fact material to the risk, and so knowing that he failed to make a disclosure of such condition, with intent to fraudulently procure the insurance, nor does it appear that the insured failed to make such disclosure when inquired of by the insurer under such circumstances as to make it the insured's duty to disclose to the insurer the existence of such 'termites' or 'dry rot.'

"'Whether or not inquiry is made by the company, the insured is not bound to disclose a fact, unless it is material and he has reason to believe that it is material.' 3 Cooley's Briefs on Insurance, 1974, and cases there cited. A fire insurance policy *will not be forfeited for concealment, where the insurer makes no inquiry, unless the concealed matter was fraudulently concealed.* Queen Insurance Co. *v.* Cummins, 206 Ky. 300, 267 S. W. 144."

Neither the District Court nor the Circuit Court of Appeals held in this case that Bernard, acting on behalf of Giller Concrete Company, Inc., in applying for and obtaining insurance with American Mutual Liability Insurance Company, was guilty of fraud in failing to specify the exact time at which the cancellation of the prior policy became, or would become, effective, or the reason for such cancellation, in the absence of an inquiry in that regard.

Point D.

In holding, on the cross-appeal, that Continental Casualty Company is liable for the attorney's fees of Giller Concrete Company, Inc., the Circuit Court of Appeals apparently overlooked the fact that this is a declaratory judgment suit, not involving coercive relief; that this suit was brought long before any coercive relief could have been obtained, and was for an advisory opinion as to the rights of the parties; and that the statute of Florida relied upon was not intended to provide a means through which one party, not entitled to coercive relief, might obtain a judicial opinion with respect to matters in dispute and foist the fees of his attorney in that behalf upon his adversary. The statute involved is Section 6220 of the Compiled General Laws of Florida of 1927 (Section 4263 Revised General Statutes; Ch. 4173, Acts of 1893, as amended by Ch. 7295, Acts of Florida of 1917). The District Judge held, properly we

believe, that this statute is not applicable to the present case. The relevant part of the statute in question is as follows:

> "Upon the rendition of a judgment or decree by any of the courts of this State against any person, company, corporation, co-partnership, association, fraternal benefit society or others, in favor of the beneficiary or beneficiaries under any policy or contract of insurance executed by such person, company, corporation, co-partnership or association, there shall be adjudged or decreed against such person, company, corporation, co-partnership or association, and in favor of the beneficiary or beneficiaries named in said policy or contract of insurance, a reasonable sum as fees or compensation for his, her or their attorneys or solicitors prosecuting the suit in which the recovery is had."

As the District Judge pointed out, the "recovery" referred to in the statute is by way of a money judgment. A declaration of rights, prior to the accrual of a cause of action, is not such a recovery.

Webster's International Dictionary defines "recovery" as "To get or obtain again; to get renewed possession of; to win back; to regain."

The statute providing for a payment in the nature of a penalty must be strictly construed. The Circuit Court of Appeals for the Fifth Circuit, in reversing a judgment of the District Court for the Southern District of Florida so held in the case of *Union Indemnity Co.* v. *Vetter*, 40 F. (2d) 606, 608. There, speaking through Judge Grubb, the Court said:

> "The District Court permitted evidence of attorneys' fees to be introduced and the jury awarded damages on that account. Attorneys' fees can be recovered only when authorized by contract or statute. 15 Corpus Juris, par. 248, p. 114. Section 4263 of the Revised General Statutes of Florida, 1920, provides for the al-

lowance of attorneys' fees in favor of a beneficiary 'under any policy or contract of insurance.' *Such statutes are strictly construed, as the imposition is in the nature of a penalty.* 33 Corpus Juris, p. 150, par. 888. 15 Corpus Juris, p. 115, par. 249. We do not think the indemnity bond on which the suit is brought is a policy or a contract of insurance within the meaning of the Florida statute."

The Supreme Court of Florida has also said in *Pendas* v. *Equitable Life Assurance Society of the U. S.*, 129 Fla. 253, 176 So. 104, that:

"The statute under which compensation for attorneys is claimed is Section 4263, R. G. S., Section 6220, C. G. L.

"In Orlando Candy Co. *v.* New Hampshire Fire Ins. Co. of Manchester (D. C.), 51 F. (2d) 392, 393, District Judge Strum, in discussing the statute under consideration, said:

" 'The statute in effect becomes a part of the contract, because the parties contract subject to the terms of the statute. The liability imposed by the statute upon the insurer is in effect an *incident of the insurer's wrongful refusal to pay,* not a mere procedural incident to the entry of judgment.' (Court's emphasis.)

"We think that is the proper construction to be placed upon the statute, and if there is no wrongful refusal to pay, then there is no statutory liability to pay."

We refer also to *Standard Insurance Co.* v. *Philpot Constr. Co.*, 183 Ark. 694, 38 S. W. (2d) 26; *Mears Min. Co.* v. *Maryland Casualty Co.*, 152 Mo. App. 178, 144 S. W. 883; and *Ocean Accident and Guarantee Corp.* v. *Northern Texas Traction Co.*, (Tex. Civ. App.), 224 S. W. 212.

The difference between a declaratory judgment suit and actions for coercive relief, from a standpoint of the taxation

of costs, is recognized in the case of *Rosenberg* v. *Village of Whitefish Bay,* 199 Wis. 214, 225 N. W. 838. This has also been recognized in the English cases of *Evans* v. *Levy* (1910), 1 Ch. 452, and *Jenkins* v. *Price* (1907), 2 Ch. 229, 235.

Whenever the attorneys' fees may reasonably be said to be a part of the penalty for violation of a public regulation, statutes allowing them to be taxed against the party in default or guilty of the wrong have been sustained. But when imposed as a penalty for resorting to the courts to enforce a natural or common law right, they have been declared invalid. We refer to *Palm Beach Bank & Trust Co.* v. *Lainhart,* 84 Fla. 662, 95 So. 122, 125, where the Supreme Court of Florida said:

> "The court erred in allowing solicitor's fees in favor of materialmen and laborers. The statute making such provision is, as has been pointed out by this court, unconstitutional. See Phillips *v.* Atwell, 76 Fla. 480, 80 South. 180; Union Terminal Co. *v.* Turner Const. Co., 247 Fed. 727, 159 C. C. A. 585, 11 A. L. R. 880; Nelson et al. *v.* Selden Cypress Door Co., 78 Fla. 204, 83 South. 286; Empire Drug Co. *v.* Smith, 78 Fla. 594, 83 South. 458; Lowe *v.* East & West Coast Ry., 79 Fla. 43, 83 South. 671."

Likewise, the Circuit Court of Appeals for the Fifth Circuit, in *Union Terminal Company et al.,* v. *Turner Construction Company,* 247 Fed. 727, 11 A. L. R. 880, in construing a Florida statute providing for attorney's fees and in holding the same unconstitutional, said:

> "In the case of Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, a Texas statute, providing that reasonable attorney's fees might be recovered against railroad companies on claims not exceeding $50 or labor, etc., was held unconstitutional. The Supreme Court used this language in disposing of the case: 'The act singles out a certain

class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees, if wrong; they do not recover any, if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.' ''

* * * * * * *

"The statute in question requires the allowance of attorney's fees, though the claim asserted by the suit is an excessive one. If the amount of the attorney's fees required to be allowed to the plaintiff is more than that of the difference between what he claimed and what he recovers, the result is to give him the unconscionable advantage of being able to make it cheaper for the defendant to forego his rights than to assert them. The statute not only undertakes to give to plaintiffs, in the character of suits mentioned, a right not accorded to plaintiffs in other suits, but it discriminates between plaintiffs and defendants in the suits to which it applies, in that the former may resort to litigation at the latter's expense, though only a fraction of the amount claimed is recoverable, while the latter is subjected to the expense of an attorney's fee, though he is wholly or partially successful in the suit. The result of the statute passed on in the last case cited (Missouri, K. & T. R. Co. *v.* Cade) is to protect a class having claims small in amount, from losing all or a substantial part of what is due them in doing what is required to

> get it. Those who claim more than is due them get no benefit from that statute. An effect of the statute now under consideration is to make defendants in only one class of suits chargeable with expenses incurred by plaintiffs who sue for more than they are entitled to recover, with the result that the defendant, though he successfully controverts the amount of the claim made against him, may be required to pay more than he owes, or than the plaintiff claimed."

It is true that the business of insurance is of such a public character that it is a proper subject of distinct regulation, and the State is so interested in the speedy adjustment and payment of losses under insurance policies that penalties may be prescribed for unreasonable delay in that respect. These statutes are correctly based upon the theory that insurance companies, after loss occurs, have the insured at a great disadvantage and are in position to inflict great damage by mere delay in the payment of losses. Therefore, it is neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for the injury where the resisted claim is finally adjudged to be just, and which will also tend to deter the company liable from delaying unnecessarily a payment due to the beneficiary.

The substance of the foregoing statement has been set forth in a multitude of decisions holding that there is no constitutional objection to the imposition of such fees upon insurance companies, without a like imposition of them upon unsuccessful plaintiffs. However, such considerations do not exist in respect to the case at bar. Here, coercive relief was not sought, but, on the other hand, only a declaration of rights was asked for. No loss had been incurred, and no reason for the infliction of a penalty upon the insurance company exists, unless it may be correctly said that the insurance company, petitioner, has been guilty of wrongful

conduct as a result of entertaining an opinion in regard to a controversial matter that was contrary to the opinion which the respondents apparently relied upon.

The Florida statute requiring an insurance company, against which recovery is had, to pay an additional sum as the insured's attorney's fees, makes such provision as an incident of the insurer's *wrongful refusal to pay a loss*, and not as a mere procedural incident to the entry of a judgment or decree against the defendant; so that the insurer is not liable for the insured's attorney's fees in the absence of such wrongful refusal. It was so held in the case of *Pendas* v. *Equitable Life Assurance Society of the U. S.*, 129 Fla. 253, 176 So. 104, *supra*.

In the case of *West Haven Bank & Trust Co.* v. *McCoy*, 117 Conn. 489, 169 Atl. 49, the Supreme Court of Connecticut, in disallowing a claim for attorney's fees in a declaratory judgment suit, said:

> "Error is claimed in the refusal of the trial court to allow counsel fees. The complaint does have some of the aspects of an action of interpleader, but it contains no claim for judgment that the parties interplead. See Practice Book 1922, p. 395, form 160. It does ask for a declaratory judgment, and we must treat it as an action therefor. Neither the statutes nor the rules provide for an allowance of counsel fees in such actions. General Statutes, par. 5334; Practice Book 1922, p. 255, par. 62, and following."

The Federal Declaratory Judgment Act, Judicial Code, Section 274d, 28 U. S. C. A. 400, does not empower the Federal Courts to award or allot attorney's fees to the prevailing party in suits or actions brought thereunder. As this act is a procedural statute, not dealing with substantive rights, proceedings under it are not controlled by State laws. *United States Fidelity & Guaranty Co.* v. *Koch*, 102 F. (2d) 288.

We have made an exhaustive search of the authorities without finding any case, other than the one at bar, in which attorney's fees in favor of the prevailing party have been allowed in a declaratory judgment suit.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

T. J. BLACKWELL,
Counsel for Petitioner.

T. J. BLACKWELL,
BLACKWELL & WALKER,
First Federal Building,
Miami, Florida.

(3143)